

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JENNIFER ZEPEDA,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

NO. CV 15-4054 AGR

MEMORANDUM OPINION AND
ORDER

Plaintiff Jennifer Zepeda filed this action on May 29, 2015. Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the magistrate judge. (Dkt. Nos. 9, 11.) On December 9, 2015, the parties filed a Joint Stipulation ("JS") that addressed the disputed issues. The court has taken the matter under submission without oral argument.

Having reviewed the entire file, the court reverses the decision of the Commissioner and remands this matter for proceedings consistent with this opinion.

I.

PROCEDURAL BACKGROUND

On March 12, 2012, Zepeda filed an application for supplemental security income alleging an onset date of January 1, 2001. Administrative Record ("AR") 22. The application was denied initially and on reconsideration. AR 22, 61, 72. Zepeda requested a hearing before an Administrative Law Judge ("ALJ"). AR 85-87. On April 11, 2013, the ALJ ordered psychological testing. AR 36, 39. On October 31, 2013, the ALJ conducted a hearing at which Zepeda and a vocational expert ("VE") testified. AR 40-52. On November 8, 2013, the ALJ issued a decision denying benefits. AR 16-31. On April 22, 2015, the Appeals Council denied the request for review. AR 1-5. This action followed.

II.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this court reviews the Commissioner's decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence, or if it is based upon the application of improper legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995) (per curiam); *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

"Substantial evidence" means "more than a mere scintilla but less than a preponderance – it is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion." *Moncada*, 60 F.3d at 523. In determining whether substantial evidence exists to support the Commissioner's decision, the court examines the administrative record as a whole, considering adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. When the evidence is susceptible to more than one rational interpretation, the court must defer to the Commissioner's decision. *Moncada*, 60 F.3d at 523.

1 III.

2 **DISCUSSION**

3 **A. Disability**

4 A person qualifies as disabled, and thereby eligible for such benefits, “only
5 if his physical or mental impairment or impairments are of such severity that he is
6 not only unable to do his previous work but cannot, considering his age,
7 education, and work experience, engage in any other kind of substantial gainful
8 work which exists in the national economy.” *Barnhart v. Thomas*, 540 U.S. 20,
9 21-22, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003).

10 **B. The ALJ’s Findings**

11 Following the five-step sequential analysis applicable to disability
12 determinations, *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006),¹ the
13 ALJ found that Zepeda has the severe impairment of borderline intellectual
14 functioning. AR 24. She does not meet a listing. AR 25. She has the residual
15 functional capacity (“RFC”) to perform a full range of work at all exertional levels
16 but is limited to simple repetitive tasks. AR 27. She does not have any past
17 relevant work, but there are jobs that exist in significant numbers in the national
18 economy that she can perform such as hospital cleaner, hand packager and
19 dining room attendant. AR 30-31.

20 **C. Listing 12.05C**

21 Zepeda contends the ALJ erred by finding that she did not meet or equal
22 Listing 12.05C.

23 At step three of the sequential analysis, the claimant bears the burden of
24 demonstrating that her impairments are equivalent to one of the listed

25
26 ¹ The five-step sequential analysis examines whether the claimant
27 engaged in substantial gainful activity, whether the claimant’s impairment is
28 severe, whether the impairment meets or equals a listed impairment, whether the
claimant is able to do his or her past relevant work, and whether the claimant is
able to do any other work. *Lounsbury*, 468 F.3d at 1114.

1 impairments that are so severe as to preclude substantial gainful activity. *Bowen*
2 *v. Yuckert*, 482 U.S. 137, 141, 146 n.5, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987).
3 “If the impairment meets or equals one of the listed impairments, the claimant is
4 conclusively presumed to be disabled. If the impairment is not one that is
5 conclusively presumed to be disabling, the evaluation proceeds to the fourth
6 step.” *Id.* at 141; see also *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999);
7 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

8 “The listings define impairments that would prevent an adult, regardless of
9 his age, education, or work experience, from performing *any* gainful activity, not
10 just ‘substantial gainful activity.’” *Sullivan v. Zebley*, 493 U.S. 521, 532, 110 S.
11 Ct. 885, 107 L. Ed. 2d 967 (1990) (quoting 20 C.F.R. § 416.925(a)) (emphasis in
12 original). “For a claimant to show that his impairment matches a listing, it must
13 meet *all* of the specified medical criteria. An impairment that manifests only some
14 of those criteria, no matter how severely, does not qualify.” *Id.* at 530 (emphasis
15 in original). “An ALJ must evaluate the relevant evidence before concluding that
16 a claimant’s impairments do not meet or equal a listed impairment. A boilerplate
17 finding is insufficient to support a conclusion that a claimant’s impairment does
18 not do so.” *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001).

19 The Ninth Circuit has summarized the three main components of listing
20 12.05C: “(1) subaverage intellectual functioning with deficits in adaptive
21 functioning initially manifested before age 22; (2) an IQ score of 60 to 70; and (3)
22 a physical or other mental impairment causing an additional and significant work-
23 related limitation.” *Kennedy v. Colvin*, 738 F.3d 1172, 1176 (9th Cir. 2013).
24 Listing 12.05 requires evidence of “significantly subaverage general intellectual
25 functioning with deficits in adaptive functioning initially manifested . . . before age
26 22.” 20 C.F.R. Pt. 404, Subpt. P, Appendix 1, § 12.05. The required level of
27 severity is satisfied when subparagraph A, B, C or D is met. *Id.* Subparagraph C
28 requires a “valid verbal, performance, or full scale IQ of 60 through 70 and a

1 physical or other mental impairment imposing an additional and significant work-
2 related limitation of function.” *Id.* “In cases where more than one IQ is
3 customarily derived from the test administered, e.g., where verbal, performance,
4 and full scale IQs are provided in the Wechsler series, we use the lowest of these
5 in conjunction with 12.05.” *Id.* § 12.00(D)(6)(c).

6 The ALJ found that Zepeda “does not meet the criteria for the diagnosis
7 (‘significantly subaverage general intellectual functioning with deficits in adaptive
8 functioning initially manifested during the developmental period’).” AR 25. The
9 ALJ therefore found it unnecessary to address 12.05C. *Id.* The ALJ reasoned
10 that Zepeda’s school records described her impairment as a learning disability
11 and not mental retardation/intellectual disability. The Regional Center diagnosed
12 borderline intellectual functioning and not mental retardation/intellectual disability.
13 With respect to adaptive functioning, the ALJ found that Zepeda’s communication
14 skills fell within the borderline range, her daily living skills were in the low normal
15 range, her social skills were in the mildly impaired to borderline range and her
16 motor skills were in the normal range. The ALJ noted that Zepeda was described
17 as “‘high functioning.’”² AR 25. Although her IQ scores were measured at 65-70,
18 she was able to complete a one-year program in cosmetology even though she
19 did not pass the licensing test. AR 25. No doctor assessed mental
20 retardation/intellectual disability. AR 26.

21 Alternatively, the ALJ found that Zepeda did not satisfy 12.05C because
22 she did not have an additional impairment that imposed significant work related
23 limitations. The ALJ assessed that Zepeda’s diagnosis of depression will not
24 impose significant limitations for at 12 consecutive months. *Id.*

25
26 ² The comment about Zepeda being “high functioning” should not be
27 misinterpreted. The comment occurred in the area of safety and was based on
28 her ability to recognize danger and seek help. The Regional Center noted,
however, that Zepeda “has to rely on others to ensure her safety due to her
inability to put such a plan in place and remember what to do.” AR 370.

1 Zepeda correctly argues that the ALJ erred in relying on the absence of a
2 diagnosis of intellectual disability. See *Christner v. Astrue*, 498 F.3d 790, 793
3 (8th Cir. 2007). “Section 12.05 does not require a diagnosis or finding of ‘mental
4 retardation,’ but relies instead on valid IQs in conjunction with other evidence to
5 establish ‘subaverage general intellectual functioning.’” *Gomez v. Astrue*, 695 F.
6 Supp. 2d 1049, 1057-58 (C.D. Cal. 2010).

7 Zepeda’s full scale IQ scores in the record were 65 in 2013 and 70 in 2012.
8 AR 350, 391. The ALJ relied on the fact that school records found Zepeda had a
9 “specific learning disability” as opposed to intellectual disability since she was 8
10 years old. AR 300, 307, 313, 328; see also AR 381. The term “specific learning
11 disability” in the California Department of Education regulations means “a
12 disorder in one or more of the basic psychological processes involved in
13 understanding or in using language, spoken or written, that may have manifested
14 itself in an impaired ability to listen, think, speak, read, write, spell, or do
15 mathematical calculations, including conditions such as perceptual disabilities,
16 brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.” 5
17 Cal. Code Regs. § 3030(b)(10). The basic psychological processes include
18 attention, visual processing, auditory processing, sensory motor skills and
19 cognitive abilities such as association, conceptualization and expression.³ *Id.* By
20 contrast, the California Department of Education regulations define the term
21 “intellectual disability” as “significantly subaverage general intellectual functioning,
22 existing concurrently with deficits in adaptive behavior and manifested during the
23 developmental period that adversely affects a child’s educational performance.”
24 *Id.* § 3030(b)(6).

25 Zepeda’s high school Individualized Education Program (IEP) indicates she
26 tested in the bottom 6% for reading (composite), the bottom 10% for math

27 ³ The school records indicate Zepeda has a specific learning disability in
28 the areas of attention, auditory and visual processing. AR 311.

1 (composite) and bottom .2% for written language (composite). AR 303. She is
2 able to understand short to moderate grade level reading assignments but has
3 difficulty comprehending long reading passages and technical directions. AR
4 304. She is able to write a single paragraph but has difficulty with multiple
5 paragraphs. AR 305. She makes consistent errors when math problems involve
6 more than two steps. AR 306. Her learning disability in the areas of attention,
7 auditory and visual processing impairs her ability “to retain and generalize
8 information in the general education setting.” AR 311. Zepeda had an extended
9 school year based on a “pattern of regression and difficulty retaining knowledge
10 after vacations and school breaks.” AR 313.

11 Similarly, the ALJ relied on the fact that the Regional Center did not find
12 mental retardation/intellectual disability but rather “developmental disorder,
13 borderline intellectual functioning” of unknown etiology.⁴ AR 376. Zepeda’s
14 “problem-solving abilities are not at age or grade level” and she “was simply
15 unable to perform within the normal range.” AR 385. Her reading and spelling
16 skills are at a fifth grade level. Although she can spell simple three and four letter
17 words, she is unable to spell words with more than one syllable. Sentence
18 comprehension is at a fourth grade level and “limited to very simple sentences.”
19 AR 386. Although she was able to go to cosmetology school, her “academic
20 abilities are below a fifth grade level and may significantly compromise her ability
21 to master a written test for licensing purposes.” *Id.* Her academic percentile rank
22 is no more than 6%. AR 387. The Regional Center concluded that: “[Zepeda]
23 will need assistance in finding and securing competitive employment. She may
24 not read or spell well enough to complete an employment application. Although
25 she has completed a cosmetology program, licensing may prove difficult.

26
27 ⁴ A person is eligible for regional center services if he or she has
28 intellectual disability or “disabling conditions found to be closely related to
intellectual disability or to require treatment similar to that required for individuals
with an intellectual disability.” Cal. Welf. & Inst. Code § 4512(a).

1 [Zepeda] appears to be an ideal candidate for supported employment given her
2 borderline verbal and nonverbal intelligence.” AR 387. Zepeda was referred for
3 supportive employment. AR 368, 371-72. She also needed training and other
4 supports “to access public transportation.” AR 369.

5 In contrast to the California Department of Education, the Social Security
6 regulations do not use the term “specific learning disability.” The Commissioner
7 does not address the ALJ’s finding as to subaverage intellectual functioning and
8 does not argue that Zepeda’s claim should be evaluated under a different listing.
9 In this case, it is undisputed that the low IQ scores are valid, and there is no
10 evidence of malingering. The court concludes that, on this record, the ALJ erred
11 in failing to find significantly subaverage general intellectual functioning initially
12 manifested before age 22.

13 Zepeda next argues that the ALJ erred in failing to find deficits in adaptive
14 functioning initially manifested before age 22. The regulations do not define the
15 phrase “deficits in adaptive functioning.” The Commissioner argues that Listing
16 12.00.C.1 refers to “adaptive activities such as cleaning, shopping, cooking,
17 taking public transportation, paying bills, maintaining a residence, caring
18 appropriately for your grooming and hygiene, using telephones and directories,
19 and using a post office.” Specifically, “[w]e will determine the extent to which you
20 are capable of initiating and participating in activities independent of supervision
21 or direction.” *Id.*

22 On this record, the ALJ erred in failing to find any deficits in adaptive
23 functioning. The record indicates that Zepeda is capable of cleaning, shopping,
24 caring for her personal hygiene and using telephones. On the other hand, the
25 Regional Center records indicate deficits in adaptive functioning. Zepeda’s
26 communication skills were estimated to fall within the borderline range. She had
27 a difficult time understanding language that is not meant to be taken literally and
28 her academic abilities are below the fifth grade level. AR 386. Her daily living

1 skills were within the low normal range. Zepeda does not drive or use public
2 transportation. *Id.*; see AR 379 (inability to learn to drive), AR 246, 255 (difficulty
3 remembering bus routes). Zepeda's social skills fell within the mildly impaired to
4 borderline range. She has only one friend, has never been out on a date and has
5 no hobbies. AR 386-87. Other Regional Center records indicate Zepeda lives at
6 home. She is able to use a microwave but uses the stove with supervision. AR
7 379. She tends to isolate in her bedroom and does not go out much socially. AR
8 369, 380. She was referred for supportive employment. AR 371-72. Her
9 stepfather pays her bills. AR 228, 231. A psychologist found that Zepeda
10 appeared younger than her stated age and was passive, childlike and very soft
11 spoken. AR 347.

12 Finally, Zepeda argues that the ALJ erred in failing to find an additional
13 impairment that imposed significant work related limitations. An impairment
14 imposes a significant work-related limitation "when its effect on a claimant's ability
15 to perform basic work activities is more than slight or minimal." *Fanning v.*
16 *Bowen*, 827 F.2d 631, 633 (9th Cir. 1987). After *Fanning*, the Commissioner
17 clarified that the additional impairment must be "severe" in order to establish "an
18 additional and significant work-related limitation of function." Revised Medical
19 Criteria for Evaluating Mental Disorders and Traumatic Brain Injury, 65 Fed. Reg.
20 50746, 50754 (2000). A finding that the claimant as a severe physical or other
21 mental impairment at step two of the sequential analysis satisfies the third
22 element. See *Rhein v. Astrue*, 2010 U.S. Dist. LEXIS 128615, *26-*27 (E.D. Cal.
23 Nov. 23, 2010).

24 Zepeda was first diagnosed with a depressive disorder in May 2013. AR
25 392. She showed evidence of psychomotor slowing, her affect was euthymic and
26 her mood was depressed. AR 390. In addition to intellectual deficits, the
27 psychologist assessed moderate difficulty in responding appropriately to usual
28 work situations and changes in a routine work setting. AR 393. The hearing took

1 place approximately five months later on October 31, 2013. AR 40. The ALJ
2 “anticipate[d] that with treatment, [depression] will not impose significant
3 limitations for at least 12 consecutive months.” AR 26. The court concludes that
4 remand is warranted to assess Zepeda’s depression and whether there is an
5 additional and significant limitation of function.

6 **D. Credibility**

7 Zepeda contends that the ALJ erred in assessing credibility.

8 “To determine whether a claimant’s testimony regarding subjective pain or
9 symptoms is credible, an ALJ must engage in a two-step analysis.” *Lingenfelter*
10 *v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). At step one, “the ALJ must
11 determine whether the claimant has presented objective medical evidence of an
12 underlying impairment ‘which could reasonably be expected to produce the pain
13 or other symptoms alleged.’” *Id.* (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344
14 (9th Cir. 1991) (en banc)).

15 Second, when an ALJ concludes that a claimant is not malingering and has
16 satisfied the first step, “the ALJ may ‘reject the claimant’s testimony about the
17 severity of her symptoms only by offering specific, clear and convincing reasons
18 for doing so.’” *Brown-Hunter v. Colvin*, 798 F.3d 749, 755 (9th Cir. 2015) (citation
19 omitted), *amended* 2015 WL 6684997 (Nov. 3, 2015); *Burrell v. Colvin*, 775 F.3d
20 1133, 1136-37 (9th Cir. 2014). “A finding that a claimant’s testimony is not
21 credible ‘must be sufficiently specific to allow a reviewing court to conclude the
22 adjudicator rejected the claimant’s testimony on permissible grounds and did not
23 arbitrarily discredit a claimant’s testimony regarding pain.’” *Brown-Hunter*, 798
24 F.3d at 755 (citation omitted). “General findings are insufficient; rather, the ALJ
25 must identify what testimony is not credible and what evidence undermines the
26 claimant’s complaints.” *Id.* (citation omitted). In weighing credibility, the ALJ may
27 consider factors including the claimant’s daily activities; and “ordinary techniques
28 of credibility evaluation.” *Bunnell*, 947 F.2d at 346 (citing Social Security Ruling

1 (“SSR”) 88-13) (quotation marks omitted).⁵ The ALJ may consider: (a)
2 inconsistencies or discrepancies in a claimant’s statements; (b) inconsistencies
3 between a claimant’s statements and activities; (c) exaggerated complaints; and
4 (d) an unexplained failure to seek treatment. *Thomas*, 278 F.3d at 958-59.

5 The ALJ found that Zepeda’s medically determinable impairments could
6 reasonably be expected to cause the alleged symptoms, but that her allegations
7 of disability “are not entirely credible” to the extent they are “inconsistent with the
8 residual functional capacity” assessed by the ALJ. AR 28. The ALJ primarily
9 relied on three reasons: (1) the fact that Zepeda expected the Regional Center to
10 help her find a job; (2) Zepeda’s activities of daily living; and (3) psychological
11 testing indicating intact memory and adequate attention span. AR 28-29.

12 Zepeda told the Regional Center that she wanted to work, and the
13 Regional Center found Zepeda appropriate for supportive employment. The ALJ
14 stated that he did not interpret the Regional Center’s referral as limiting Zepeda to
15 supportive employment with a job coach. “[R]ather, the Regional Center offered
16 the claimant services within its scope.” AR 28.

17 The ALJ’s finding is not supported by substantial evidence. Under
18 California’s Lanterman Act, “developmentally disabled persons receive services
19 through providers under contract with a ‘regional center.’” *Arc of California v.*
20 *Douglas*, 757 F.3d 975, 979 (9th Cir. 2014). A regional center is “a diagnostic,
21 counseling, and service coordination center for developmentally disabled persons
22 and their families.” 17 Cal. Code Regs. § 54302(a)(54). There is no indication
23 that a regional center simply offers an eligible person any service within its scope.
24 Instead, the regional center is required to prepare an individual program plan

25
26 ⁵ Social Security rulings do not have the force of law. Nevertheless, they
27 “constitute Social Security Administration interpretations of the statute it
28 administers and of its own regulations,” and are given deference “unless they are
plainly erroneous or inconsistent with the Act or regulations.” *Han v. Bowen*, 882
F.2d 1453, 1457 (9th Cir. 1989).

1 (IPP) “developed through a process of individualized needs determination.” Cal.
2 Welf & Inst. Code § 4646(b)-(c). The IPP includes an assessment of the
3 claimant’s capabilities and limitations, and a schedule of the type and amount of
4 services necessary to achieve certain objectives. *See Sanchez v. Johnson*, 416
5 F.3d 1051, 1064 (9th Cir. 2005); Cal. Welf. & Inst. Code § 4646.5. When
6 developing an IPP for a working age adult, the interdisciplinary team “shall
7 consider the Employment First Policy in § 4868 et seq. *Id.* §§ 4646.5(a)(4), §
8 4868(a)(2).

9 Here, the regional center performed an initial evaluation and sent Zepeda
10 for psychological evaluation. After receipt of the pertinent reports, the regional
11 center “determine[d] eligibility for Regional Center services.” AR 383. The
12 psychologist performed a comprehensive psychological evaluation including IQ
13 and other testing, behavioral observations, cognitive functioning and adaptive
14 functioning. AR 384-87. The psychologist concluded that Zepeda “appears to be
15 an ideal candidate for supported employment given her borderline verbal and
16 nonverbal intelligence.” AR 387. The term “supported employment” means
17 services that are provided by a job coach in order to support and maintain an
18 individual with developmental disabilities in employment. 17 Cal. Code Regs. §
19 54302(a)(69). Zepeda’s IPP indicated that she is referred to New Horizons (NH)
20 for supportive employment, including job development/placement and coaching.⁶
21 AR 368-69. The IPP team concluded she “will need mobility training, aides en
22 route, or other supports to access public transportation safe[l]y.” AR 369.
23 Accordingly, the fact that a developmentally disabled adult wants to work at a job
24 is not inconsistent with disability.

25 An ALJ may consider a claimant’s daily activities when weighing credibility.
26 *Bunnell*, 947 F.2d at 346. Here, as discussed above, Zepeda’s daily activities

27 ⁶ Zepeda testified at the hearing that the regional center told her “they
28 were going to help me and put a coach” but that had not happened yet. AR 47.

1 were not inconsistent with the disability she is alleged to have and were not
2 inconsistent with the Regional Center's assessment of her capabilities. Zepeda
3 could not learn to drive, AR 379, and did not use public transportation because
4 she had difficulty remembering bus routes, AR 246, 255. Her allegations are
5 consistent with the regional center's IPP, which also concluded that she needed
6 help to learn to use public transportation. AR 369. As explained by the regional
7 center, her abilities made her an "ideal candidate" for supportive employment.
8 AR 387. A claimant need not be completely incapacitated to receive benefits.
9 *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014).

10 Lack of objective medical evidence supporting the degree of limitation
11 cannot form the sole basis for discounting a claimant's credibility. *Burch v.*
12 *Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). The ALJ cites one examining
13 psychologist's report that found intact immediate, recent and remote memory.
14 AR 349. This one report is inconsistent with the remaining reports and her school
15 records. See, e.g., AR 385, 391-92 (finding weak working memory in the bottom
16 percentile). In any event, the ALJ's credibility assessment cannot rest on this
17 factor alone. The ALJ erred in his credibility determination.

18 **IV.**

19 **ORDER**

20 IT IS HEREBY ORDERED that the decision of the Commissioner is
21 reversed and the matter remanded for further proceedings consistent with this
22 opinion.

23 IT IS FURTHER ORDERED that the Clerk serve copies of this Order and
24 the Judgment herein on all parties or their counsel.

25
26
27 DATED: December 17, 2015



ALICIA G. ROSENBERG
United States Magistrate Judge